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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 475

DAN PAUL,
Petitioner,

vs.

DADE COUNTY, FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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DADE COUNTY, FLORIDA,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Dan Paul ("Petitioner") petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida entered in this case May 8, 1968. Petitioner's petition for rehearing was denied on June 6, 1968.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (Appendix, *infra*, pp. A1-A26; R. 6-33) is reported at 210 So. 2d 200. The opinion and decree of the Dade County Circuit Court (Appendix, *infra*, pp. A29-A41; R. Vol. II, 216-218, 223-232) is unreported.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on May 8, 1968 and that Court denied Petitioner's petition for rehearing by Order entered on June 6, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), since rights guaranteed under the United States Constitution have been denied petitioner.

QUESTION PRESENTED

The sole question presented to this Court is:

Whether a governmental agency denies due process and equal protection of the laws by affording a tax exemption to a favored private corporation and agreeing to pay from other public funds all taxes levied against that corporation (which corporation also is granted the cloak of that agency's character so as to secure a lower interest rate on its construction financing) when the effect of that tax exemption and indemnity is to increase the tax burden on the remaining taxpayers.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is that portion of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides:

> "No state shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF THE CASE

In 1967 National Airlines, Inc. (National) and the Dade County Port Authority (Authority) agreed to construct $32,359,000 of new facilities for National's exclusive

use at Miami International Airport (R. Vol. I, 85-89, Vol. II, 337-387) through issuance and sale by Authority of Special Revenue Bonds (R. Vol. I, 3, 106-107). The new facilities were to be leased to National for its sole use, and included a maintenance apron, an in-flight kitchen, two multi-level parking garages for National employees, a hangar, a utilities center, a four-story addition to National's office building, an enlargement of its simulator building for training its employees, and a cafeteria for National's employees (R. Vol. I, 137). National has complete control over these facilities, as is shown by the recitation of facts (undisputed by the majority) set forth in the dissenting opinion below (Appendix, *infra*, pp. A10-A14; R. 15-18).

All the facilities are to be tax-exempt for the term of the lease. In order to insure National its purported tax exemption Authority agreed to pay for National any taxes which might be levied against the new facilities (R. Vol. I, 131-132). The key provision in the agreement between Authority and National provides:

> "It is expressly understood and agreed that the Authority shall, if not prohibited by law, assume and pay *all taxes and improvement charges of any nature whatsoever* which may be levied and assessed against the New Facilities, or the leasehold interest of National therein." (Emphasis added).

The validation of Authority's bonds was challenged in the Dade County, Florida Circuit Court by the State Attorney for the Eleventh Judicial Circuit of Florida (Dade County) and by Dan Paul as property owner, tax payer and citizen of Dade County. The Dade County Circuit Court validated the bonds (Appendix, *infra*, pp. A29-A41; R. Vol. II, 216-218, 223-232). Both challengers appealed this decree to the Supreme Court of Florida (R. 1-5) which

affirmed on May 8, 1968 with three of the seven justices dissenting (Appendix, *infra*, pp. A1-A26; R. 6-33). Petitioner's Petition for Rehearing was denied on June 6, 1968 (R. 38).

HOW FEDERAL QUESTION IS PRESENTED

The Petition for Validation requested the Circuit Court to issue a decree validating the bonds to be issued and the proceedings taken in connection therewith, "including the Lease Agreement, the Supplemental Agreement and the Resolution" (R. Vol. I, 10). Petitioner's answer claimed, *inter alia*, that the provision of the lease exempting National from taxes and other charges on the facilities and agreeing to pay all taxes which might be levied against National while requiring Petitioner and others in the county to pay such taxes, constituted a violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution (R. Vol. II, 221). The Circuit Court concluded as a matter of law that all terms of the lease arrangement were valid and the bonds could legally be issued to fund National's facilities (Appendix, *infra*, pp. A29-A41; R. Vol. II, 216-218, 223-232). These constitutional issues were again specifically raised by Petitioner in the subsequent direct appeal to the Supreme Court of Florida (R. Vol. III, 423). The Supreme Court of Florida found that "the financing as shown here is consistent with the law of this State and in no way is it inconsistent with the Constitution of the State of Florida or the United States" (Appendix, *infra*, p. A6; R. 11). Petitioner again raised these issues in his Petition for Rehearing (R. 34-37), which was denied.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Florida (no opinion having been concurred in by a majority of that court) sanctions the use by government of the property tax so as to discriminate against the urban resident—and particularly the low-income central city resident—for the benefit of certain favored business interests. The decision denies equal protection to exactly those urban residents who most need that protection.[1] The dissenting opinion in the Supreme Court of Florida concluded that this governmental action violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. The majority of four justices disagreed.

The Supreme Court of Florida here has held that the financing by Authority of private facilities for National was for a "public purpose" within the contemplation of Section 10, Article IX of the Florida Constitution. This decision is not contested by this Petition. However, the determination of "public purpose" for validity of bond financing under the Florida Constitution has no relevance to the issue posed by this Petition as to whether the equal protection clause permits government to exempt from (or indemnify against) taxes certain favored property at the expense of other property not so favored. *Wayland* v. *Snapp*, 232 Ark. 57, 78, 334 S.W.2d 633, 644 (1960) (dissenting opinion); *Public Industrial Financing*, 111 U. PA. L. REV. 265, 319-323 (1963).

This Court has held that the equal protection clause prohibits discrimination through state taxation. *Wheeling Steel Corporation* v. *Glander*, 337 U.S. 562 (1949); Newhouse, *Constitutional Uniformity and Equality in*

1. Even where fairly applied, the property tax has always been criticized for its regressive nature—"That is, the tax as a percentage of the income of those who bear the ultimate burden declines as income rises". Netzer, *Economics of the Property Tax* (Brookings Institution, 1966), pp. 5, 46-47, 53-55.

State Taxation (Michigan Legal Studies 1959), pp. 601-608. Although this Court has given a certain license to state taxing authorities to make the impact of property taxes unequal through rational classifications, we are concerned here with an arbitrary and capricious attempt to exempt one private corporation from payment of any taxes whatsoever. It is clear that under the best of circumstances, the "increasing burden of municipal taxes frequently falls upon that part of the urban population least able to pay them." *Report of the National Advisory Commission on Civil Disorders* (1968), p. 393. But, here, by governmental fiat, one private corporation is freed of any burden of taxation whatsoever, and nevertheless receives the benefits of municipal services at the expense of the remainder of the community, including those already disadvantaged under the best of circumstances.

Recent studies of the property tax have shown that this tax has its highest impact on residential property in the low-income center city and has an additional impact of preventing new building in and refurbishing of ghetto areas. See, generally, Netzer, *Economics of the Property Tax* (Brookings Institution, 1966) and, as to the effect on urban areas, Netzer, *Impact of the Property Tax* (prepared for and printed by the National Commission on Urban Problems (1968)). This impact is heavy on owner-occupied residences, yet heavier on the renter. The vast majority of low-income occupants of center city properties rent their living quarters and the property tax is passed through by the owner to the occupant through increased rentals. Netzer, *Impact*, p. 22.[2]

2. Florida affords a special property tax exemption to owner-occupants of residential property—a $5,000 "homestead exemption." Fla. Stats. §192.12. This exemption is not available to either lessor or lessee of rented residential property. The bulk of low-income center city residents, being renters, thus do not receive the benefit of this exemption. The non-availability of the homestead exemption is a compounding factor in considering the effect of granting a favored private corporation an exemption from (or indemnification against) taxation.

Netzer concludes that consumers "via their rents" pay in taxes amounts which are "very sizeable increments to their housing costs". *Id.* at p. 24. The effect of the property tax on living standards and conditions in the urban area is substantial.

> "First, taxes raise the cost of housing to the occupants and simply put a significant part of the existing housing stock beyond the reach of many in the low-income population. For example, take a large urban family with an income of $4,000. The maximum tolerable rent for such a family (if the rent is not paid by public assistance) might be said to be 30 percent of income or $100 a month. Assume that the prevailing level of property taxes is 25 percent of rents in that city. Were property taxes on housing eliminated this family could afford to rent an apartment now renting for $133 a month, without exceeding 30 percent rent/income ratio, an apartment which is now out of reach.
>
> "There is yet another aspect to all this. Most low-income families do spend large proportions of their incomes for housing, but not all of them do so. In the 1960 Census, there were 3.8 million renter households with incomes below $3,000 for whom rent/income ratios were computed. Roughly 600,000 of these spent less than 25 percent of their incomes for housing. Now it is a worthy objective to attempt to persuade some of these families to moderately increase the proportions of income spent for housing, by offering them greatly improved housing conditions at small increases in rent. A reduction in the property tax burden could do just that, by reducing the prices of housing across-the-board. To return to the $4,000 urban family, assume a present rent/income ratio of 20 percent, which means a monthly rent of $67. A 50 percent reduction in property taxes, combined with an increase in rent/income ratio to 25 percent, would

> permit this family to rent an apartment which now rents for $97 a month, a 45 percent improvement in housing conditions (presumably) with a one-fourth increase in actual rental payments." *Id.* at pp. 26, 28.

In addition, the property tax deters improvements in the central city housing supply. *Id.* at p. 28. In sum, the "deterrent effects of high taxes on consumption of, and investment in, housing in large central cities are serious." *Id.* at p. 39.

The exemption (or indemnification) here involved must have the effect of increasing the level of taxation to all users of the residential housing supply and to all other taxpayers. Municipal services are principally provided from property tax revenue.[3] The exemption afforded favored industry in this case must place Dade County, at least in part, in the position of taxing the poor to provide free services to the rich, which is surely anomalous.

In addition, the granting of a tax exemption to one favored corporation denies equal protection to non-favored businesses. It would seem obvious that:

> "There is no reason to believe that industrial lessees [who have received industrial revenue bond financing—such as National here] need the indirect subsidy of tax exemption any more than do manufacturers who construct new plant facilities with private financing. Quite to the contrary, the manufacturer who with great difficulty obtains private financing at high interest rates may have the greater need of tax relief. It is also possible that the economic benefits to the community derived from his activity may be greater than those realized from lessees of municipal facilities." *Public Industrial Financing, supra,* at page 321.

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3. Local education receives over 50% of the local property tax revenue. About 55% of all school current expenditures and almost 50% of all other local governmental expenditures are financed from the property tax. Netzer, *Economics, supra,* at p. 10. Dade County's experience parallels these national averages.

Industrial financing has been rather universally condemned. Abbey, *Municipal Industrial Development Bonds*, 19 VAND. L. REV. 25 (1965); *The Proliferation of Industrial Revenue Bond Financing: Ban the Bond?* 41 TEMP. L.Q. 289 (1968). Its economic value is nil. Its burden on the non-favored groups is great. However, the issue of industrial financing is not presented by this Petition. The sole question presented here is whether government may free one private corporation, which is to be the recipient of free municipal services, from the general taxation which supplies the revenues to provide those services. On this question the dissenting opinion in the Supreme Court of Florida adopted in full the following statement from *Smith* v. *State*, 222 Ga. 552, 150 S.E. 2d 868 (1966):

> " 'The discrimination in taxation which the Equal Protection clauses forbid is the failure of the taxing authorities to tax all like property which is subject to taxation equally or tax the property of one owner and exempt like property belonging to another owner' * * * the exemption of private industry from taxes while requiring plaintiff and other private industry in the county to pay said taxes would constitute taking of the property of plaintiffs and other taxpayers of Telfair County who are engaged in private business, without due process of law and would deny them equal protection of the law in violation of the federal Constitution. Thus, the constitutional amendment * * * is in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States." See Appendix, *infra*, p. A26; R. 32-33.

See also, *Village of Moyie Springs* v. *Aurora Manufacturing Company*, 82 Idaho 337, 353 P.2d 767 (1960). We submit that the quoted passage is a correct statement of the mandate of the Fourteenth Amendment and its rejection by the majority of the court below was serious error.

CONCLUSION

Petitioner submits that for the foregoing reasons this pressing issue should be reviewed by this Court and therefore this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September, 1968

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1968

STATE OF FLORIDA, ET AL.,
Appellants,

vs.

COUNTY OF DADE, FLORIDA, by its Board of County Commissioners acting as DADE COUNTY PORT AUTHORITY,
Appellee.

Case No. 36,867

ADAMS, J.

This is an appeal from a decree validating revenue certificates.

Phenomenal growth of the Miami International Airport required considerable further expansion and in 1967 the County of Dade, acting through the Dade County Port Authority, which will hereafter be referred to as the "Authority," entered into what might be termed a revised agreement with National Airlines, hereafter referred to as "National." The sum and substance of the revised agreement is for the Authority to lease to National for a period of thirty (30) years about seventy-five (75) acres of land of the airport for a ground rent of something more than $350 per acre as an annual rent and in addition, National

is to pay a rental on the improvements to be erected thereon sufficient to retire revenue producing bonds of $34,640,000 over the thirty (30) year period. This is in fact a conventional lease agreement designed to finance buildings on the leased area to accommodate National's expansion, which in turn also contributes primarily to the continued development of Miami International Airport. This lease covers a relatively small part of the entire airport.

The lease is necessarily lengthy and it must of necessity be comprehensive. We are, however, not concerned and it's not our function to override the business judgment of the contracting parties (see Town of Medley vs. State, 162 So.2d 257, Fla. 1964). We have, however, examined it to the point of ascertaining that on the whole it is an agreement entered at arm's length for the mutual advantage of the two contracting parties and the whole undertaking is for a public purpose. The rental payments are necessarily scheduled to enable the Authority to issue revenue bonds in such fashion as to render them acceptable to the money market.

The State, through the State's Attorney and the interested taxpayer, the Honorable Dan Paul, has challenged the decree of validation in that it violates Section 10, Article IX, of the Florida Constitution, which reads as follows:

> "Section 10. Credit of state not to be pledged or loaned.—The credit of the State shall not be pledged or loaned to any individual, company, corporation or association; nor shall the State become a joint owner or stock-holder (sic) in any company, association or corporation. The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money

for, or to loan its credit to, any corporation, association, institution or individual."

Frankly we do not feel that this is an open question. This Court has consistently gone along with the Authority as appears from our opinions cited herein. National, as in the previous cases, is not just a private corporation which might be classified as a newcomer. It has demonstrated its experience and it likewise is a public service corporation engaged in serving the public in a great transportation system. To reverse our field now and strike down this decree would be difficult to understand in the light of our previous holdings in this very situation. We are still convinced that this overall project of the Dade County Airport is a public project. To now hold that we were wrong and invalidate this decree would naturally perplex thoughtful and concerned people as well as create great consternation. The tremendous growth of this airport lends support to our position rather than demonstrates error.

The interested taxpayer in the proceedings before the Chancellor indulged the hypothesis that our decision in the case of State of Florida vs. Jacksonville Port Authority, 204 So.2d 881 (1967), had the effect of receding from the line of cases which we have decided on this subject. In this he is very much in error. The Jacksonville Port Authority did not persuade this Court that the functionary was sufficiently public in nature as to warrant them in approving the plan of financing. Likewise is there a distinction in State of Florida et al vs. Manatee County Port Authority, 193 So.2d 162 (1966), from the one now before us. In the Manatee case the overall purpose was private rather than public.

It is our conclusion that we upheld the validity of this act in State of Florida et al vs. Dade County, 27 So.2d

283 (1946), and in the other cases which have come to us under this act from the identical airport. See also Seaboard Air Line R. Co. vs. Peters, 43 So.2d 448, Fla. 1949. We have upheld validations under similar lease agreements. Therefore we see no reason to condemn this one.

We likewise distinguish this decree from our holding in State of Florida et al vs. Clay County Development Authority, 140 So.2d 576 (1962). In the latter case the Court was of the opinion that the overall purpose was private and not public because there they were dealing with a private corporation with the thought of engaging in the plastic business, a private as distinguished from a public purpose. In no sense was that a public project.

The interested taxpayer has further questioned the validity of the agreement as violative of Sections 1, 5 and 10 of Article IX and Section 16 of Article XV of the Florida Constitution. We have duly examined the whole record and we are not persuaded that these contentions have merit. We have likewise considered the other questions posed and we find that they relate to isolated and fragmentary elements in the lease agreement and when standing alone they might be offensive, but considering the broad scope of the entire lease agreement we are convinced that the facility will be built and serve as part and parcel of the public functionary, to-wit the airport. There is a complete absence of any obligation on Dade County to levy any tax to support this endeavor. It is our conclusion that this undertaking is no different in principle and character to that of the other issues which have been brought to this Court pursuant to this act and the amended acts of the Legislature.

Appellants object to the plan to construct parking facilities, a restaurant and training school. We will n[illegible]on-

demn this project because the contracting parties concluded in their judgment all of these were essential and added to the effectiveness of the prime purpose. This falls in their area of judgment so long as we find that the expenditure for them is incidental to the prime objective.

We consider an objection made by the State's Attorney to this mode of financing and we quote his brief:

> "Appellee maintains that the construction of facilities at the airport are for the public benefit and that no harm can come in effect from this bond issue. The fact remains that whenever revenues are pledged for such purposes as building an employees (sic) parking garage, the revenues are not then available to be pledged for other purposes such as constructing additional landing areas or increasing the size and capacity of the terminal or any number of other projects of a direct benefit to the public. The record reflects an indication that these bonds are salable in part because they are Federally tax exempt. How long will the Federal treasury permit a tax exempt status to municipal bonds when they are being used for other than strictly municipal purposes? The affirmance of this validation runs the risk of killing the goose that laid the golden egg."

Our answer to this criticism lies in the fact that this Court is not a policy-making institution. In retrospect the machinery for this kind of undertaking stems from the policy of the Legislature by creating the authority, granting the powers and determining the purpose. It is the duty of the Court to honor the legislative act unless we are convinced beyond a reasonable doubt that it contravenes the Constitution of our State. Suffice it to say here the cited cases in this opinion show that this Court many years ago approved the validity of the enabling act. Be it remem-

bered also that the Legislature has met many times and not only seen fit to let the act stand, but in their wisdom they have re-enacted it with suitable changes. It would be presumptuous and most improper for us to invade the prerogative of the Legislature. In spite of all the objection which is registered relative to the parking facilities, restaurant and training school, we can well understand that these can be facilities essential to more effectively carrying out the real purpose of the airport facility. Objection is made because National is to have the exclusive use and control of this facility and that they will no doubt earn profits on the same. It is quite obvious that National must make a profit to stay in business. It is a well-known fact that they are not running a great airline as an eleemosynary institution. On the other side the Authority has an obligation to avail itself of competent and dependable agencies such as National, as chosen in this case, to perform this public function for the use and benefit of the public. It would seem to follow that National must of necessity have control of the premises upon which they are paying the lease.

This is a common method used the world over to finance public improvements. There are some areas where the money is to be found and there are other areas where the know-how is to be found and one of the many functions of government is to utilize these two in promoting those functions which are so highly essential and necessary for the public and as to this project we determine again that it is a public purpose and the financing as shown here is consistent with the law of this State and in no way is it inconsistent with the Constitutions of the State of Florida or the United States.

Hence the decree is affirmed.

ROBERTS and ERVIN, JJ., concur

THORNAL, J., agrees to conclusion with opinion

CALDWELL, C.J., and THOMAS, J., dissent

DREW, J., dissents with opinion

THORNAL, J., concurring in conclusion:

I concur in the conclusion for reasons set out in the dissenting opinions in State v. Jacksonville Port Authority, 204 So. 2d 881 (Fla. 1967); State v. Washington County Development Authority, 178 So. 2d 573 (Fla. 1965); Brandes v. City of Deerfield Beach, 186 So. 2d 6 (Fla. 1966); State v. Clay County Development Authority, 140 So. 2d 576 (Fla. 1962). These references will reveal my consistent view that revenue bonds, such as those here proposed, are not condemned by the Florida Constitution. My concern in recent years, has resulted from what appeared to me to be a deviation from this Court's own precedents. Hence, my dissent then, and now, my concurrence on the basis of those dissents. I must frankly concede that I can find no distinction between the financing program tendered here, and the one ruled out by the Majority in Jacksonville Port Authority, supra. I think they are both equally valid. The validity of the instant proposal was placed at rest fifteen years ago. State v. City of Miami, 62 So. 2d 404. Recent deviations from this authoritative precedent, have, in a measure, inspired the dissents to which I now advert.

In arriving at my conclusion here, I sense no disloyalty to stare decisis or judicial responsibility. Consistent judicial insistence upon the soundness of a dissenting position, is not inharmonious with the traditional fulfillment

of judicial mission. I regard it to be the duty of a judge to continue to urge his position with aggressive dignity so long as there remains a reasonable possibility that his views may prevail. See, e.g., Brown v. State, 206 So. 2d 377. (Fla. 1968).

I, therefore, do not agree that the instant revenue certificate issue is valid because of any characteristics which allegedly distinguish it from Jacksonville Port Authority, supra. I simply feel that it should be upheld for the same reasons which I feel should have prevailed, but failed to prevail, in the decisions cited at the outset of this opinion.

I concur in the conclusion of affirmance.

DREW, J., dissenting:

This is an appeal by the State of Florida and Dan Paul, an intervening taxpayer, from a final decree of the Circuit Court of Dade County validating $34,640,000 of Dade County Port Authority Special Revenue Bonds, proposed to be issued for the purpose of providing funds for the construction and erection of certain facilities for the exclusive use of National Air Lines, Inc. on lands owned by the Port Authority and leased to National. The lease agreement for 30 years, dated October 16, 1967,[1] pursuant

1. This lease agreement is the seventh amendment to the original lease of October 1, 1952 pursuant to which the Authority issued $750,000 of revenue bonds to construct for National a "warehouse and overhaul shop". These bonds were the subject of our decision in State v. Dade County, 1952, 62 So. 2d 404. Thereafter, in June and September 1955, pursuant to amendments #1 and 2 to the original lease, additional bonds were issued and validated. These bonds were the subject of our decision in State v. Dade County, 1955, 84 So. 2d 41. This latter opinion affirmed the final decree of validation on the authority of the decision in 62 So. 2d.

to which these bonds are proposed to be issued reveals that such facilities are to consist of a new aircraft maintenance apron, an in-flight kitchen, two employees' parking structures, a new aircraft hanger, an administration facility and a utilities center. The bonds are to be retired, according to the lease agreement, from rentals to be paid by National to the Port Authority over the period of the lease agreement or from rental payments received from others than National for the new facilities. In addition to the $34,640,000 issue of bonds validated by the questioned decree, the agreements between the parties contained the further provision that the Authority will issue such additional revenue bonds as may be required to complete the payment of the cost of constructing the facilities described in the lease agreement and other documents.

The bond resolution authorizing the issuance of such bonds specifically provides that the bonds shall not be deemed to constitute a debt of the County of Dade and that the County is not obligated to pay the bonds or the interest thereon except from the special fund heretofore alluded to and that the faith and credit of the County are not pledged to the payment of such principal and interest.

The principal contention of appellants is that the issuance of such bonds violates Section 10, Article IX, of the Florida Constitution.[2] Appellants also contend that the Authority's attempted tax exemption and its agreement to pay any taxes assessed against the facilities violates

2. "Section 10. Credit of state not to be pledged or loaned. —The credit of the State shall not be pledged or loaned to any individual, company, corporation or association; nor shall the State become a joint owner or stockholder in any company, association or corporation. The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual."

Sections 1, 5 and 10 of Article IX and Section 16 of Article XIV of the Florida Constitution and constitutes the taking of the property of appellants and other taxpayers of Dade County without due process of law and denied to them equal protection of the law in violation of Section 12 of the Florida Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

As to the first contention, viz: whether the issuance of the proposed bonds violates Section 10 of Article IX of the Florida Constitution, which prohibits a county from appropriating money for or lending its credit to any corporation, association, institution or individual, it is necessary to examine some of the provisions of the lease agreement between the Authority and National. The agreement between the parties which has been validated and confirmed in the questioned final decree contains, among others, the following provisions material to the disposition of the primary question:[3]

1. The Authority cannot make any rules and regulations which "restrict the use of the new facilities".

2. National has almost sole control over the bond proceeds and the construction of the facilities. National in its own discretion has the right to require the Authority to commence construction prior to the sale of the bonds by advancing the costs. The Authority agrees to repay National such advances. If the bonds are not sold the Authority could be left with a half-completed building and be required to repay National from its other funds such as ad valorem tax funds levied by the Authority under its taxing powers. The

3. Compare these provisions with those discussed in State v. Manatee Port Authority, 1966, 193 So. 2d 162, and State v. Jacksonville Port Authority, 1967, 204 So. 2d 881. Both authorities in these cases were engaged in the operation of facilities for water transportation while in this case the Authority is engaged in air transportation, both admittedly public purposes.

plans and specifications are prepared at National's direction; National determines whether and when construction will begin. All commitments and advances made by the Authority for engineering or architects' or consultants' fees and expenses for surveys and testing are subject to the prior written approval of National. National determines how the project is to be split for purpose of bidding. The Authority cannot enter into "any contract without the prior written approval of National". The terms and conditions of all contracts for the construction of the facilities shall be subject to the prior written approval of National. "If the bid of the lowest responsible bidder for any portion of the Project is excessive in the sole opinion of National", the Authority is required to reject all bids. National can also require the Authority to readvertise the bids if it so requests. The Authority is required to force the contractor to pay National liquidated damages or a performance bond "to protect National from financial loss resulting from failure of the contractors to meet the agreed completion date". National controls the action the Authority can take to enforce timely completion. Moreover, the lease agreement provides "any liquidated damages received by the Authority pursuant to such construction contracts shall be for National's account".

3. If a default causes the bonds to become immediately due and payable, National is not required to accelerate its obligation to make payments and the Authority would have to pay the bonds from other funds.

4. If the proceeds from the sale of the $34,640,000 bond issue are insufficient to pay for the new facilities, National can require the Authority to authorize, validate, and sell and issue additional revenue bonds to complete the project.

5. National has the exclusive use of the new facilities for a broad variety of its own private purposes until the year 1997.

6. National has the right to elect how insurance proceeds are used. If National elects to use the proceeds to pay the bonds and there is any excess, the Authority has to pay National for each remaining year of the lease 4% of the excess insurance proceeds.

7. National inspects the facilities for itself to determine whether it is complying with its obligation to keep the buildings in repair and the Authority has no right to have an engineer or architect inspect for the Authority unless National fails to do so or 5% in principal amount of bond holders request an inspection. And then no such inspection by the Authority's architects and engineers may be made more often than once in any 36-month period.

8. If the bonds are refunded the Authority has to pay National for the loss of earnings which it is estimated would have been derived from the investment of moneys in the bond service and reserve account.

9. National has the right to force the Authority to authorize and endeavor to sell refunding bonds of the Authority.

10. If National damages the property the Authority has no recourse against National but must look solely to the insurance. If the Authority damages National's property, the Authority is liable to National in full.

11. National can terminate the Supplemental Agreement upon 30 days' written notice to the Authority if in National's opinion the Airport becomes inadequate for National's operations because the Authority has failed to provide adequate facilities for National. If National so terminates the agreement, the Authority has to pay National for each year then remaining in the term of the agreement 4% of the proceeds of the bonds including earnings and bond discounts together with 2-1/2% interest. "The repayments required to be made to National under the provisions of this Agree-

ment shall be made from any funds of the Authority available for such purpose. . .".

12. National without the Authority's consent may sublet any part of the new facilities which it doesn't need to anyone for "aviation related purposes".

13. The Authority agrees to pay any taxes which may be levied against National.

14. The Authority is required at its own expense and not payable from the bond proceeds to install all utility services, including water, gas, electricity, sewage, and telephone.

The Authority conceded at the hearing in said cause that it obtains nothing for the public for the attempted exemption from all taxes, depreciation on the facilities and the amortization savings to National, and having funds raised by such facilities at the Authority's lower interest rate.

The provisions of the lease agreement demonstrate the complete abdication of the county's power and authority over this project and its subsequent use. Such control is incompatible with any theory of "a public purpose".

In the past fifteen years this Court has rejected as violative of Section 10, Article IX, of the Florida Constitution many bond issues proposed by public bodies to finance various projects. In 1952 in State v. Town of North Miami, 59 So. 2d 779, this Court rejected a proposal of the Town of North Miami to issue bonds to be used to purchase lands within the corporate limits to erect an aluminum manufacturing plant and to lease the same for a term of 20 years to a private corporation. In that same year in Adams v. Housing Authority of City of Daytona Beach, 60 So. 2d 663, this Court held that Chapter 27072, Acts of 1945, authorizing a redevelopment project of the City of

Daytona Beach, was violative of Section 10, Article IX, in that an attempt was there made to authorize the appropriation of public funds for private purposes and to loan the credit of the city to corporations, associations or individuals for purposes not public. In 1954 in City of Clearwater v. Caldwell, this Court held that an attempt by the City of Clearwater to lease for 50 years for profit or as an investment for the city to a private individual for private gain or profit to him a portion of land theretofore acquired by it for municipal purposes was violative of Article 10, Section IX. In 1959 in City of West Palm Beach v. State, 113 So. 2d 374, this Court refused to validate an issue of public obligation bonds to be used for the construction of a civic center composed of auditoriums, restaurants, marinas, stores, swimming pools, grandstands, off street parking, central recreation building, artificial beaches and a fuel station and to lease the same to a private corporation for a period of years because such arrangement violated Section 10 of Article IX. In 1960 in State v. Suwannee County Development Authority, 122 So. 2d 190, this Court refused to validate revenue anticipation certificates of Suwannee County Development Authority to provide funds for the purpose of purchasing land and constructing thereon buildings for lease to private industry which the authority hoped to bring into the county, as being violative of Section 10, Article IX. In 1962 in State v. Clay County Development Authority, 140 So. 2d 576, this Court reversed a decree validating $500,000 of revenue anticipation certificates proposed to be issued by the Clay County Development Authority for the purpose of constructing a building and appurtenances to be leased to a private corporation over a period of years for the manufacture of plastic products, as violative of Section 10, Article IX. In 1965 in State v. Washington County Development Authority, 178 So. 2d 573, this Court held violative of Article 10, Section IX, an attempt

of the Authority there to borrow $244,000 from the United States of America for the purpose of aiding and financing a rural development project for sale to purchasers approved by the government as violative of Article 10, Section IX. In 1966 in Brandes v. City of Deerfield Beach, 186 So. 2d 6, the City of Deerfield Beach attempted to issue bonds for the purpose of acquiring land and constructing facilities to be used as spring training headquarters for the Pittsburgh Pirates and to thereafter lease the same to the corporation owning said ball club. This Court rejected said bonds as being violative of Section 10, Article IX.

Today the ink is barely dry upon two decisions of this Court refusing to validate revenue bonds sought to be issued by duly constituted public authorities because they violated the mandate of Section 10 of Article IX of the Florida Constitution. These cases are State v. Manatee County Port Authority and State v. Jacksonville Port Authority.[4] The facts in these two cases are clearly delineated in the respective opinions. In both cases this Court refused to validate the industrial bonds proposed to be issued by these public authorities because to do so would offend the constitutional mandate of Section 10, Article IX. In the Manatee County case Justice Thomas, speaking for the Court, said:

> "We thought and hoped that we had laid down a specific exception to the rule that public funds may not be spent for private purposes. This rule was announced as early as 1933 in the case of Brumby v. City of Clearwater, 108 Fla. 633, 149 So. 203. In the intervening years, the exception has been recognized. We have repeatedly held that use of part of the proceeds of such bonds for incidental private operations will not vitiate the entire issue, but we have reiterated the restriction that diversion of any part of the funds will

4. See note 3, supra.

not be tolerated unless the expenditure is purely incidental to the main project. Such were the effects of the decisions in Adams v. Housing Authority of City of Daytona Beach, Fla., 60 So. 2d 663; Gate City Garage, Inc. v. City of Jacksonville, Fla., 66 So. 2d 653; Panama City v. State, Fla., 93 So. 2d 608; State v. Clay County Development Authority, Fla., 140 So. 2d 576, and in the later case of State v. Washington County Development Authority, Fla., 178 So. 2d 573, and in the recent case of Brandes v. City of Deerfield Beach, Fla., 186 So. 2d 6.

"In most, if not all, of these cases the plea has been made that the proposed project would be of great benefit to the area affected. In the present case the converse is presented with great emphasis on behalf of the City of Tampa which, it is argued, would become a 'second rate' port if the contemplated project materialized. But neither the advantage to one community nor the disadvantage to another is the criterion by which this Court should judge the merits of a given project. The guiding star is the Constitution itself and the interpretation conscientiously given it by this Court."

In the Jacksonville Port Authority case the Court said:

"In the past fifteen years a majority of this Court has consistently adhered to the mandates of this section of the Constitution when confronted by proposals to issue public securities in which the private interests to be served by the overall project was more than incidental. The cases are legion in which this Court has flatly refused to approve the issuance of public securities for the purpose of assisting in the establishment of industrial developments, housing projects, building apartment houses, baseball stadiums and projects of such nature, no matter how worthy the objectives might have been in such cases where the benefit to the public was shown to be only incidental. The dissenting opinions which have been filed in many of these cases are the best evidence of the fact that this Court

has limited the issuance of such public securities to those instances where the private purpose served [if any] was purely incidental such as that which existed in the Gate City case in Jacksonville, the Panama City case and many others.

"It is said in some of the dissenting opinions that this Court has not been consistent in its views upon the subject. The basic principle involved has been consistently adhered to. The factual issue, however, of whether the public purpose was the overriding and paramount purpose has evoked dissension in the Court from time to time. The cleavage, if any, lies in this area."

The proposal here to construct these facilities for National is a far more flagrant violation of Section 10 of Article IX than that which existed in either the Manatee County or the Jacksonville Port Authority cases.[5] The

5. The abuse of the power to issue such tax exempt securities for the primary benefit of private individuals or corporations has resulted in a recent proposed regulation by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, the effect of which is to eliminate the tax exempt status of such securities issued subsequent to March 15, 1968 except such bonds initially sold at any time prior to September 15, 1968 under the conditions named in the regulation.

In paragraph 1.103-7 of such proposed regulation, it is provided:

"Example (1) (a) Governmental Unit A and corporation X enter into an agreement under which the governmental unit is to provide a factory which corporation X will lease for 20 years. The agreement provides (1) that the governmental unit will issue $10 million of bonds, (2) that the proceeds of the bond issue will be used to purchase land and to construct and equip a factory in accordance with corporation X's specifications, (3) that corporation X will rent the facility for 20 years at an annual rental equal to the amount necessary to amortize the principal and pay the interest on the outstanding bonds, and (4) that such payments by corporation X and the facility itself shall be the security for the bonds."

That the bonds involved in these proceedings fall squarely within this example cannot be successfully controverted. See Federal Register, Volume 33, #58, Saturday, March 23, 1968, p. 4951, et seq.

approval of these revenue bonds today completely emasculates Section 10 of Article IX. The door is now wide open for the issuance of industrial bonds by any political subdivision of this State. These facilities have absolutely nothing to do with the essential operations of Miami International Airport. The failure to build said facilities and to lease said buildings to one air carrier, National, for its exclusive use, would not materially affect the operation of the Miami International Airport as a public utility. If it constituted a valid public purpose, by the same reasoning the Port Authority would have the power to condemn any lands in Dade County and to construct thereon similar buildings and facilities for every other airline operating through the International Airport, or to construct and erect any facility however remotely related to air transportation. If this is now to be the law of this State, it should be done by constitutional amendment and legislative action, not by tearing out of our present Constitution the provisions which have been in it since it was originally enacted in 1885 and which have served a most salutary purpose.[6]

The majority place great emphasis on the cases of State of Florida v. Dade County, Fla. 1946, 27 So. 2d 283, and Seaboard Air Line R. Co. v. Peters, Fla. 1949,

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6. After months of study, the Florida Constitutional Revision Commission, created under the authority of Chapter 65561, General Laws, Acts of 1965, proposed a new article to the Florida Constitution to replace Section 10 of Article IX to read as follows:

> "Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend, or use its taxing power or credit directly or indirectly to aid any corporation, association, partnership, or person; . . ."

Instead of receding from the position which this Court has taken from the beginning, such proposal is much stronger in its condemnation of any arrangement to extend the State's credit to individuals.

43 So. 2d 448. In neither of these cases was the question of a violation of Section 10 of Article IX involved.[7] The earlier case involved the question of whether the population act creating the Dade County Port Authority violated Section 21 of Article III of the Constitution in that it classified counties by population on a subject which had no reasonable relation to the subject regulated and that the purposes for which the act was created, viz. purchasing the former Pan American Airways Airport, was a valid county purpose. This Court held that the act was not violative of such provision and that the operation of an airport was a valid public county purpose. It approved the issuance of revenue bonds of two and a half million dollars to be used for the purpose of acquiring this public facility. No question was involved relative to extending the credit of the State to any private individual or corporation.

The second case involved a proposed issue of revenue bonds to purchase additional land for the airport and to pay for removal and relocation of certain railroad facilities thereon. There this Court held that the acquisition and development of additional land essential to the safe operation of Miami International Airport was a county purpose for which such revenue bonds could be issued. The question of Section 10 of Article IX was in no way involved in these proceedings. Mr. Justice Hobson in that case in a special concurring opinion stated:

> ". . . It is necessary in this case only to determine whether the maintenance and improvement of *this* airport is an essential government requirement of *Dade County*. The Courts will decide whether an airport

7. The validation statutes of this State do not protect bond holders on matters not adjudicated in the decree. Sec. 75.09, Fla. Stat. 1967. The statutory language is ". . . such judgment is forever conclusive as to all matters adjudicated. . . ."

in any other county of Florida is an essential governmental requirement when faced with that question.[8]

The majority opinion to which this dissent is directed also contains the statement:

> "We likewise distinguish this decree from our holding in [the Clay County case]. . . . In the latter case the Court was of the opinion that the overall purpose was private and not public because they were dealing with a private corporation with the thought of engaging in the plastic business, a private as distinguished from a public purpose. In no sense was that a public project."

In the Clay County case referred to,[9] this Court rejected a proposed issue of revenue bonds as violative of Section 10 of Article IX of the Constitution. The holding in that case was not as stated in the majority opinion that "the overall purpose was private and not public." The Court had previously decided in State v. Cotney, 104 So. 2d 346, that the statute creating the Clay County Development Authority was a valid statute but specifically pointed out in that opinion that the provisions in the act authorizing the public authority thereby created to sell or lease por-

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8. In the later case of State v. Town of North Miami, 59 So. 2d 779, this Court speaking through Mr. Justice Mathews for a unanimous Court said with reference to this case:

> "State v. Dade County, 157 Fla. 859, 27 So. 2d 283, was a recognition by this Court that air transportation was one of the great innovations of the age, that Miami was potentially one of the greatest air transportation points in the world, and that Florida is a port of entry for air transportation from South and Central America, the West Indies and Africa. The airport in question was to be publicly owned and publicly operated and it is recognized that air transportation, such as that flowing into and out of Miami, serves a real public purpose, and in developing this port, owning and operating the same, it could not be said that the City of Miami [Dade County] was not serving a public and municipal [county] purpose."

9. State v. Clay County Development Authority, 140 So. 2d 576.

tions of the improvement to private parties would not invalidate the plan for acquisition and improvement of the property by the public body where a valid public purpose would be effectuated by such a plan. The following is a quotation from that opinion:

> ". . . The setting aside for industrial and commercial purposes of a portion of the property already purchased is certainly a part of the balanced over-all plan for the County's development; but there is nothing in the record here to show that this was the primary purpose for the acquisition of the federal government's surplus tract of land rather than an incidental part thereof. In these circumstances we can find nothing in the previous decisions of this court construing §10 of Article IX requiring us to hold that the Authority's acquisition of the property and proposed program for its development amounts to an appropriation of the Authority's funds for, or the lending of its credit to, a private enterprise."

The quoted language above was merely a reiteration of the long-standing holding of this Court in cases of this kind that a public purpose would not be defeated by the fact that private parties benefited therefrom so long as the private purpose was purely incidental to the paramount public purpose. Such, in my humble judgment, is *not* the case here.

The Authority says that this Court has already approved a substantial number of bond validations based on leases calling for the construction of comparable or identical facilities built in the Miami International Airport and has thus "in unequivocal language aligned this Court with the legislative determination of the public nature of the facility." As to the quoted language, there is not now nor has there been since the decision of this Court in State v. Dade County, 27 So. 2d 283, any question that the operation of the Miami International Airport and the facilities neces-

sary thereto constitute a public purpose. There can no longer be any question on this point. Air travel has largely replaced other modes of passenger transportation and has made great inroads upon the delivery of things. Hangars for the use of repairing and storing planes such as that involved in State v. Okaloosa County Airport and Industrial Authority, 168 So. 2d 748, are necessary adjuncts to the operation of an airport. In this connection, however, it should be noted that in the Okaloosa County case the Court said "Clearly, there is an interdependence between the Authority's airport and the facilities proposed for the repair, maintenance and care of the aircraft of *the flying public using said airport.* For example, runways on a public airport are not the only facilities essential to the functional operation of an adequate airport. A number of other facilities and aids are essential, including those contemplated in the project here." There is a vast distinction between the operation of such a facility for the benefit of the "flying public" and operation for the exclusive benefit of one corporation, viz. National Airlines.

As to the argument as to former bond validation decisions approving these or similar lease agreements, reliance is apparently upon two cases of this Court, viz. State v. Dade County, 62 So. 2d 404, and State v. Dade County, 84 So. 2d 41.[10] Both of these cases involved proposed bond issues quite similar to that involved in this case. In both cases this Court approved the issuance of bonds similar to those involved in this case for the purpose of erecting certain facilities for National Airlines. The first case involved bonds to be financed from revenues from the facility over a period of ten years, and the second involved bonds to be issued for the purpose of furnishing additional facilities for National Airlines, such

10. See footnote 3, supra.

bonds to be retired from revenues from the facility over a period of twenty-five years. The two questions raised, argued or determined by this Court in these cases were whether these bonds required the prior approval of the voters of Dade County in accordance with the provisions of Article IX, Section 6, of the Florida Constitution, and the power of the authority to enter into the lease agreement referred to in the opinions. The question of whether the arrangements between the Port Authority and National Airlines set forth in these two opinions violated the provisions of Section 10, Article IX of the Florida Constitution was not raised, argued or determined, and such cases cannot be said to be authority for the proposition that this Court has held such bonds not to be in contravention of said constitutional provision.[11]

I unreservedly say that this Court for the first time today has held an issue of industrial bonds by a public authority of this State not to be violative of Section 10, Article IX of the Constitution. As we pointed out in the Jacksonville Port Authority and Manatee County cases where the question has been raised, this Court as a condition to its approval of such obligations made a specific finding that any private purpose served was purely incidental to the public purpose.

In an era when supremacy of law already suffers daily attack, I stand in real fear of the consequence of a decision which can only "bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."[12] There is in the present case not the slightest suggestion of any change in law or circumstance on the basis of which courts have justified a departure from precedent or altered constitutional

11. See footnote 7, supra.

12. Smith v. Allwright, 321 U.S. 649, 669, 64 S.Ct. 757, 768.

construction.[13] When this Court approves today that which it held yesterday to be proscribed by the same constitutional provisions applied to other parties, there can be no clearer rejection of the concept of equality before the law.[14] The administration of justice in this fashion violates, in my opinion, elemental principles of judicial action and, quite likely, constitutionally guaranteed rights.

The great economic considerations here involved, together with their peculiar susceptibility to change by the will of the people expressed in constitutional amendment, impel a judicial restraint far beyond the ordinary considerations of stare decisis. In recognition of a necessity for such judicial self-restraint, and the fact that in some matters "it is more important that the applicable rule of law be settled than that it be settled right,"[15] I have on numerous occasions refused to repudiate recent decisions rendered by a majority of the members of the Court against my express dissent.[16] Even critics of the doctrine of precedents concede the necessity for such restraint:

> ". . . It happens again and again, where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time. The situation would, however, be intolerable if the weekly changes

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13. Ga. S. & F. Ry. Co. v. Seven-Up Bottling Co, Fla. 1965, 175 So. 2d 39.

14. Cf. Frank, *Courts on Trial*, Ch. XIX, p. 267, et seq.

15. Burnet v. Coronado Oil & Gas Co. (1932), 285 U.S. 393, 406.

16. Seaboard Air Line Railroad Company v. Williams, Fla. 1967, 199 So. 2d 469, 471; Johnson v. State, Fla. 1961, 130 So. 2d 599, 601.

". . . now that the Court has decided otherwise judicial self-discipline requires me to follow the political dogma now constitutionally embedded in consequence of that decision. . . ." Avery v. Midland County, Tex., ... U.S. ....., opinion filed April 1, 1968.

in the composition of the court were accompanied by changes in its rulings. . . ." Lecture IV, Cardozo, *The Nature of the Judicial Process.*

The question raised by the taxpayer Paul referred to in the introduction to this opinion concerning the Authority's attempted tax exemption of the facilities is, in my opinion, well founded. The supplemental agreement provides:

> "It is expressly understood and agreed that the Authority shall, if not prohibited by law, assume and pay all taxes and improvement charges of any nature whatsoever which may be levied or assessed against the New Facilities, or the leasehold interest of National therein."

The above provision not only exceeds the powers granted the Dade County Port Authority but I think exceeds any power which could be lawfully granted to it. Section 16 of Article XVI of the Constitution requires the taxation of all property of corporations except such as shall be used for certain designated purposes.[17] Section 1 of Article X contains a provision that the Legislature shall provide for uniform and equal taxation. In my judgment the fact that the title to the property in question remains in the Authority is of no importance in view of the fact that the property will for these long years be used exclusively by a private corporation.[18] I would agree completely with the holding of the Supreme Court of Georgia in the case of Smith v. State, 150 S. E. 368, in which case, in passing

17. Compare Jasper v. Mease Manor, Inc., case no. 36,211 opinion filed March 27, 1968.

18. See Sec. 192.62, F.S., which in terms authorizes taxation of leasehold interests in immune property which is used for private profit. Also see Hillsborough County Aviation Authority, etc. v. R. R. Walden as Tax Assessor of Hillsborough County, Florida, our case #36,990, opinion filed April 24, 1968.

upon an identical question, the Supreme Court of Georgia said:

> " 'The discrimination in taxation which the Equal Protection clauses forbid is the failure of the taxing authorities to tax all like property which is subject to taxation equally or tax the property of one owner and exempt like property belonging to another owner' * * * the exemption of private industry from taxes while requiring plaintiff and other private industry in the county to pay said taxes would constitute taking of the property of plaintiffs and other taxpayers of Telfair County who are engaged in private business, without due process of law and would deny them equal protection of the law in violation of the federal Constitution. Thus, the constitutional amendment * * * is in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States."

Also see Village of Moyie Springs v. Aurora Manufacturing Company, 353 P. 2d 767, 82 Idaho 337 (1960).

There is another cogent reason why this Court should not take this giant stride. There will inevitably be three new members of this Court in January of 1969, about eight months hence. If these Justices in subsequent cases involving this section of the Constitution should have the views expressed in this dissent, then we may well, once again, be back where we started. What, then, becomes of our concept that "this is a government of laws and not of men"?

I dissent.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM A.D. 1968

THURSDAY, JUNE 6, A.D. 1968

STATE OF FLORIDA, ET AL.,
Appellants,
vs.
COUNTY OF DADE, FLORIDA &C.,
Appellee.

Case No. 36,867

On consideration of the Petition for Rehearing filed by Attorney Dan Paul,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,

TEST:

Sid J. White
Clerk Supreme Court

(THE MANDATE IN THIS CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT FOR DADE COUNTY)

Mandate from Supreme Court of Florida

To the Honorable, the Judges of the CIRCUIT Court for the ELEVENTH JUDICIAL CIRCUIT of Florida. Greeting:

WHEREAS, Lately in the CIRCUIT Court of THE ELEVENTH JUDICIAL CIRCUIT, IN AND for the County of DADE in a cause wherein

COUNTY OF DADE, FLORIDA, BY ITS BOARD OF COUNTY COMMISSIONERS ACTING AS DADE COUNTY PORT AUTHORITY, was petitioner and THE STATE OF FLORIDA, ET AL., were respondents

67-16251

the Decree of said Circuit Court was rendered Nov. 27, 1967 as by the inspection of the transcript of the record of the said Circuit Court which was brought into the Supreme Court of the State of Florida, by virtue of an appeal agreeably to the laws of said State in such case made and provided, fully and at large appears:

AND WHEREAS, at the January Term of said Supreme Court holden at Tallahassee, A. D. 1968, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and was argued by counsel; in consideration whereof, on the 8th day May A. D. 1968 the said Supreme Court rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof.

In Consideration Whereof, It Is Ordered by the Court that the Appellee do have and recover of and from the Appellants costs in this behalf expended herein taxed except the $25.00 filing fee, which has been paid by the Appellants, and that all other costs shall be taxed in the court in which the appeal was entered, therefore, 10 June 68

YOU ARE HEREBY COMMANDED, That such further proceedings be had in said cause as according to right, justice, the judgment of said Supreme Court, and the laws of the State of Florida, ought to be had, the said decree of the Circuit Court notwithstanding.

WITNESS, The Honorable MILLARD F. CALDWELL Chief Justice of said Supreme Court, and the seal of said Court at Tallahassee, this 6th day of June 1968

(Seal)

Clerk Supreme Court of Florida

Chief Deputy Clerk

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY
CIVIL ACTION

No. 67-16251

COUNTY OF DADE, FLORIDA, BY ITS BOARD OF COUNTY COMMISSIONERS ACTING AS DADE COUNTY PORT AUTHORITY,
Petitioner,

vs.

THE STATE OF FLORIDA, et al.,
Respondents.

Order

This cause came on to be heard before the Court on Final Hearing on November 14 and 15, 1967. The Court reviewed the petition for validation submitted by the petitioner, the answers and responses filed by both the State of Florida, as represented by and speaking through the State Attorney for the Eleventh Judicial Circuit of Florida, and Intervenor Dan Paul, who appeared in pro persona, and the substantial exhibits placed in evidence by the aforementioned parties and persons. The Court also heard the testimony of the four witnesses called by the petitioner and the single witness called by the State of Florida. After carefully considering the foregoing and the oral and written argument submitted by counsel for the petitioner and the State Attorney, the Court hereby

ORDERS and ADJUDGES as follows:

1. The petitioner has the power to issue revenue bonds in the manner contemplated in the above styled suit by virtue of the provisions of Chapter 22963, General Laws of Florida, 1945, as amended from time to time, and in

particular by those provisions of the aforesaid Chapter 22963, also known as the Port Authority Act, which are set out in Paragraph X of the petition for validation.

2. The petitioner has exercised the power to issue revenue bonds in a valid and lawful manner through its adoption of Resolution No. R-1233-67 entitled

> "A RESOLUTION AUTHORIZING THE ISSUANCE OF $34,640,000 DADE COUNTY PORT AUTHORITY SPECIAL REVENUE BONDS (DATED NOVEMBER 1, 1967) OF THE COUNTY OF DADE, FLORIDA."

on October 16, 1967. A copy of this Resolution is attached to the petition for validation as Exhibit "C."

3. The validation of the bonds sought by the petitioner is declared valid and lawful by the Court and not in violation of Article IX, Section 10 of the Constitution of Florida, an organic section prohibiting the State or its political subdivisions from lending or pledging credit for a private purpose. The Court's examination of the recent Supreme Court decision in *State* v. *Jacksonville Port Authority* (Supreme Court No. 36,379, of Oct. 4, 1967), *State* v. *Dade County*, 27 So.2d 283, *Seaboard Air Line R. Co.* v. *Peters*, 43 So.2d 448 (1949), *State* v. *Dade County*, 62 So.2d 404 (1953), *State* v. *Dade County*, 84 So.2d 41 (1955), *State* v. *Okaloosa County Airport and Industrial Authority*, 168 So.2d 745, and *State* v. *Clay County Development Authority*, 140 So.2d 576 (1962), leads it to conclude that the proceeds of the bond issuance will be devoted primarily and fundamentally to public purposes. Both the Miami International Airport and the structures to be erected thereon with the proceeds of the bond financing will serve a fundamental and essential public need. Any private benefit that may be derived will be incidental to the primary public purpose which is served.

The petitioner is hereby directed to prepare a final decree validating the proposed bond issue in accordance with this order.

DONE and ORDERED in Chambers at the Dade County Courthouse, Miami, Florida, this 22nd day of November, 1967.

/s/ Marshall C. Wiseheart
Circuit Judge.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR THE COUNTY OF DADE

COUNTY OF DADE, FLORIDA, BY ITS BOARD OF COUNTY COMMISSIONERS ACTING AS DADE COUNTY PORT AUTHORITY,

Petitioner,

vs.

THE STATE OF FLORIDA AND THE SEVERAL PROPERTY OWNERS, TAXPAYERS AND CITIZENS OF DADE COUNTY, FLORIDA, INCLUDING NON-RESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN, AND OTHERS HAVING OR CLAIMING ANY RIGHT, TITLE OR INTEREST IN PROPERTY TO BE AFFECTED BY THE ISSUANCE OF THE BONDS HEREIN DESCRIBED, OR TO BE AFFECTED IN any WAY THEREBY,

Respondents.

Civil Action No. 67-16251

Validation of $34,640,000 Dade County Port Authority Special Revenue Bonds (Dated November 1, 1967) of the County of Dade, Florida.

Decree

This cause coming on to be heard on the 14th day of November, 1967, at the hour of 2:00 o'clock P.M., of said day, at Circuit Court Room No. 405 in the Courthouse in the City of Miami, in the County of Dade, in the Eleventh Judicial Circuit of Florida, upon the Petition of the County of Dade, Florida, by its Board of County Commissioners acting as Dade County Port Authority (hereinafter some-

times called the "Authority"), for the validation of $34,640,000 Dade County Port Authority Special Revenue Bonds (Dated November 1, 1967) of the County of Dade, Florida, pursuant to a Notice and Order to Show Cause heretofore issued by this Court requiring the Respondents to show cause at said time and place why said Dade County Port Authority Special Revenue Bonds (Dated November 1, 1967) and the proceedings in connection with the issuance of said bonds, should not be validated and confirmed as was prayed in said Petition and it appearing that copies of said Notice and Order and of said Petition were served upon the State Attorney for the Eleventh Judicial Circuit of Florida, as required by law, and that said Notice and Order was published as required by law, and that said State Attorney has filed an Answer as required by law; and that no one except said State Attorney, D. P. S. Paul and said Petitioner has filed any appearance herein; and it further appearing that the Court has jurisdiction of this cause and of the subject matter hereof and of the parties hereto, and evidence having been introduced and the cause submitted for consideration and decision, the Court, having heard and determined all of the questions of law and of fact in this cause, *finds the facts* as follows:

(a) All of the material allegations in said Petition for Validation are true, and the issuance of said $34,640,000 Dade County Port Authority Special Revenue Bonds (Dated November 1, 1967) of the County of Dade, Florida, has been duly authorized.

(b) The County of Dade, Florida (hereinafter sometimes called the "County") through its Board of County Commissioners acting as Dade County Port Authority owns and operates the airport property in the County commonly known as the Miami International Airport (hereinafter called the "Airport").

(c) The Authority and National Airlines, Inc. (hereinafter called "National") have entered into a Lease Agreement dated as of October 1, 1952, as amended by agreements dated as of June 30, 1955, September 16, 1955, March 27, 1956, November 8, 1960, May 29, 1961, January 1, 1965 and October 16, 1967 (said Lease Agreement as so amended being hereinafter called the "Lease Agreement") pursuant to which the Authority has leased to National, for the term beginning October 1, 1952 and ending March 31, 1997, certain tracts of property at the Airport together with certain buildings constructed thereon (such buildings being hereinafter called the "Existing Buildings").

(d) Under date of September 1, 1965 the Authority and National entered into a Supplement to the Lease Agreement (hereinafter called the "1965 Supplement") to provide for the financing and construction of certain additional facilities at the Airport and the leasing thereof to National.

(e) Pursuant to the 1965 Supplement the Authority has heretofore issued $1,900,000 Special Revenue Bonds (dated January 1, 1965) of the Authority to finance the costs of such additional facilities, said bonds and the interest thereon being payable solely from the rental payments to be made by National for such additional facilities under the 1965 Supplement.

(f) The Authority and National have entered into an additional Supplemental Agreement dated as of July 1, 1967, for the term beginning on said date and ending March 31, 1993 (said Supplemental Agreement, including any amendments thereof made pursuant to Section 209 of the Resolution, hereinafter mentioned, being hereinafter called the "Supplemental Agreement"), pursuant to which the Authority has agreed (i) to construct on the property leased to National by the Lease Agreement the new build-

ings and other structures and other facilities which are described in Exhibit A appended to the Supplemental Agreement (such new facilities being hereinafter called the "New Facilities"), and (ii) to construct the improvements to the Existing Buildings which are described in Exhibit B appended to the Supplemental Agreement (such improvements being hereinafter called the "Improvements" and together with the New Facilities being hereinafter collectively called the "Project").

(g) The Authority has agreed in the Supplemental Agreement that it will, for the purpose of paying the cost of the Project, issue its special revenue bonds in an initial amount not exceeding $34,640,000, and in such additional amount as may be required to complete the payment of such cost, such special revenue bonds to be payable solely from the rental payments provided by the Supplemental Agreement to be made by National to the Authority for the New Facilities (or from rental payments received from others than National for the New Facilities).

(h) National has ageed in the Supplemental Agreement to pay the Authority (in addition to the rental payable by National under the Lease Agreement and the 1965 Supplement) as rental for the New Facilities such sums as shall be necessary from time to time to pay the principal of and the interest on said bonds and to maintain a reserve in the sinking fund for said bonds for such purposes, and, among others, all expenses of the Authority in connection with the payment of the principal of and the interest on said bonds, the administration of the trusts created in connection with said bonds and otherwise carrying out the covenants made by the Authority with the holders of said bonds.

(i) The Authority has determined to provide for the issuance from time to time of additional special revenue

bonds under the terms and conditions hereinafter set forth for the purpose of paying all or a part of the cost of constructing any additional buildings, structures or facilities having utility in airline operations on property leased to National by the Lease Agreement and any improvements or enlargements of the New Facilities or of such additional buildings, structures or facilities (such additional buildings, structures and facilities and such improvements and enlargements being hereinafter collectively called the "Additional Facilities") and for paying a limited amount of the cost of additional improvements.

(j) Under the authority of Chapter 22963, General Laws of Florida, 1945, as amended (said Chapter 22963, as amended, being hereinafter called the "Port Authority Act") the Authority at a meeting held on October 16, 1967, duly passed and adopted Resolution No. R-1233-67 entitled:

> "A RESOLUTION AUTHORIZING THE ISSUANCE OF $34,640,000 DADE COUNTY PORT AUTHORITY SPECIAL REVENUE BONDS (DATED NOVEMBER 1, 1967) OF THE COUNTY OF DADE, FLORIDA."

Said resolution (herein sometimes called the "Resolution") provides for the issuance of special revenue bonds of the County (hereinafter sometimes called the "bonds"), to be designated "Dade County Port Authority Special Revenue Bonds (Dated November 1, 1967)", in the aggregate principal amount of Thirty-Four Million Six Hundred Forty Thousand Dollars ($34,640,000), for the purpose of providing funds for paying the cost of the Project. The Resolution sets forth the provisions, among others, with respect to the application of the proceeds of the bonds issued thereunder, the special fund charged with and pledged to the payment of the interest on and the principal of the bonds and the rights of the holders of the bonds.

(k) The Resolution provides for the creation of a special fund designated "Dade County Port Authority Resolution No. R-1233-67 Special Revenue Bonds Interest and Sinking Fund", which special fund is pledged to and charged with the payment of the principal of and the interest on all bonds issued under the provisions of the Resolution, and provides for the deposit to the credit of said special fund of all of the rentals (other than the amounts needed to pay bank fees and certain other expenses) for the New Facilities and for any Additional Facilities paid by National to the Authority pursuant to the Supplemental Agreement and any amendments thereof, or, in the event of a cancellation of the Supplemental Agreement by the Authority for the default of National, all of the net revenues (other than the ground rentals) derived by the Authority from the leasing of the New Facilities and said Additional Facilities to others than National.

(l) The Supplemental Agreement provides that the Authority shall not be required to enter into any contract, or any change orders in connection therewith, for the construction of any portion of the Project if the balance of the net proceeds received from the sale of the bonds which are available for the construction of the Project are not sufficient to cover all amounts which the Authority will be required to pay under such contract and all other contracts theretofore entered into by the Authority for the construction of the Project unless National shall have deposited with the Authority the additional funds which will be needed by the Authority to make all such contract payments, or unless additional funds are obtained by additional financing or otherwise by the Authority as provided in the Supplemental Agreement.

As *Conclusions of Law*, from the foregoing facts, the Court finds:

(1) That the Port Authority Act fully authorizes the Lease Agreement and the Supplemental Agreement between the Authority and National.

(2) That the execution of the Lease Agreement and the Supplemental Agreement was properly authorized by the Authority and National and that all of the terms, covenants and provisions of the Lease Agreement and the Supplemental Agreement are in accordance with law and fully authorized by the Port Authority Act and the Lease Agreement and the Supplemental Agreement are valid and binding contracts between the parties thereto.

(3) That the Port Authority Act and said resolution No. R-1233-67 fully authorizes the issuance of said $34,640,000 Dade County Port Authority Special Revenue Bonds (Dated November 1, 1967) of the County of Dade, Florida, for the purpose and in the manner and form and having the details provided in said Resolution No. R-1233-67.

(4) That said Resolution No. R-1233-67 was properly adopted by the Authority and is sufficient in form and in substance to authorize the issuance of the bonds for the purposes specified therein and that all of the terms, covenants and provisions of said Resolution No. R-1233-67 are in accordance with law and are fully authorized by the Port Authority Act, and are hereby in all respects validated and confirmed.

(5) That said $34,640,000 Dade County Port Authority Special Revenue Bonds (Dated November 1, 1967) have been duly authorized for a proper public purpose and in the manner and as required by law, and when

issued will be valid and binding special obligations of the County of Dade, Florida, payable solely from the special fund provided therefor from the rentals of the New Facilities and designated "Dade County Port Authority Resolution No. R-1233-67 Special Revenue Bonds Interest and Sinking Fund".

(6) That, as provided by said Resolution No. R-1233-67 and by the terms of the bonds themselves, the bonds will not be deemed to constitute a debt of the County of Dade and the County will not be obligated to pay the bonds or the interest thereon except from the special fund provided therefor from revenues, and the faith and credit of the County are not pledged to the payment of such principal or interest and the issuance of the bonds will not directly or indirectly or contingently obligate the County to levy or to pledge any taxes whatever therefor or to make any appropriation from the revenues of the County or of the Authority for their payment except from such special fund.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that said $34,640,000 Dade County Port Authority Special Revenue Bonds (Dated November 1, 1967) of the County of Dade, Florida (hereinafter more particularly described), and the proceedings therefor, including the Lease Agreement, the Supplemental Agreement and said Resolution No. R-1233-67, be and the same are hereby validated and confirmed.

Said $34,640,000 Dade County Port Authority Special Revenue Bonds (Dated November 1, 1967) are to be issued in the denomination of $5,000 each, numbered from 1 to 6,928, inclusive, are to bear interest from their date until their payment at a rate or rates not exceeding the maximum rate then permitted by law, such interest to the

maturity thereof being payable semi-annually on the 1st days of January and July in each year, and are to be stated to mature (subject to the right of prior redemption), as follows:

$3,640,000 aggregate principal amount of said bonds, consisting of bonds numbered 1 to 728, inclusive, shall be serial bonds and shall be stated to mature in annual installments, on January 1, in the order of their numbers, lowest numbers first, in the following years and in the following amounts:

Year of Maturity	Principal Amount	Year of Maturity	Principal Amount
1971	$455,000	1975	$455,000
1972	455,000	1976	455,000
1973	455,000	1977	455,000
1974	455,000	1978	455,000

$31,000,000 aggregate principal amount of said bonds, consisting of bonds numbered 729 to 6,928, inclusive, shall be term bonds and shall be stated to mature on the 1st day of January, 1993.

The bonds will be registrable as to principal alone and also as to both principal and interest and, if registered as to both principal and interest, may be reconverted into coupon bonds, in accordance with the provisions endorsed thereon and subject to the terms and conditions set forth in said Resolution No. R-1233-67.

Both the principal of and the interest on the bonds will be payable in any coin or currency of the United States of America which on the respective dates of payment thereof is legal tender for the payment of public and private debts. The principal of the bonds, unless registered, and the interest on bonds not registered as to both principal and interest will be payable at the principal office of The Chase Manhattan Bank (National Association), in the Borough

of Manhattan, City and State of New York, or, at the option of the holder, at The First National Bank of Miami, in the City of Miami, Florida. Payment of the interest on the bonds to the maturity thereof will be made only upon presentation and surrender of the coupons, if any, representing such interest as the same shall become due; or, if any bond shall be registered as to both principal and interest, payment of the interest on such bond on any interest payment date will be made to the person appearing on the registration books of the Authority as the registered owner thereof, such interest to be paid by check or draft mailed to the registered owner at his address as it appears on such registration books. The principal of any bond registered as to principal alone or as to both principal and interest will be payable upon the presentation and surrender thereof at the principal office of The Chase Manhattan Bank (National Association).

The bonds will be signed by, or will bear the facsimile signature of, the Chairman of the Authority and will be signed by the Clerk or a Deputy Clerk of the Authority and a facsimile of the official seal of the Authority will be imprinted on the bonds. The coupons attached to the bonds will be executed with the facsimile signature of said Chairman. In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or coupons shall cease to be such officer before the delivery of such bonds, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery and also any bond may bear the facsimile signature of or may be signed by such persons as at the actual time of the execution of such bond shall be the proper officers to sign such bond although at the date of such bond such persons may not have been such officers. The bonds and the interest

coupons thereto attached, the statement of validation and the provisions for registration and reconversion to be endorsed on the bonds will be, respectively, substantially in the forms set forth in said Resolution No. R-1233-67.

DONE AND ORDERED in open Court at the Courthouse in the City of Miami, Florida, this 27th day of November, 1967.

/s/ Marshall C. Wiseheart
Judge of the Circuit Court of the Eleventh Judicial Circuit of Florida.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 22 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 475

DAN PAUL,

Petitioner,

vs.

DADE COUNTY, FLORIDA, by its Board of County Commissioners acting as the DADE COUNTY PORT AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 475

DAN PAUL,

Petitioner,

vs.

DADE COUNTY, FLORIDA, by its Board of County Commissioners acting as the DADE COUNTY PORT AUTHORITY,

Respondent.

RESPONSE AND BRIEF OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS

The question as stated in the Petition is patently argumentative and should be rephrased as follows:

Whether due process and equal protection of the laws are denied any taxpayer when the County exempts from County ad valorem taxation certain airport facilities constructed and owned by the county and leased to a commercial airline for use by that airline in carrying out certain airport related activities which have been defined by the State Legislature of Florida as activities primarily serving municipal or public purposes.

An additional question presented is: Whether this Court has jurisdiction to review the judgment of the Florida Supreme Court on the basis that a decision on the application of the equal protection and due process clauses of the Fourteenth Amendment was not necessary for the judgment rendered.

STATEMENT OF THE CASE

The Board of County Commissioners of Dade County, Florida, acting as the Dade County Port Authority (Authority), on October 16, 1967 adopted Resolution No. R-1233-67 authorizing the issuance of Dade County Port Authority Special Revenue Bonds (Dated November 1, 1967) in the face amount of $34,640,000, for the purpose of providing funds for constructing a new aircraft maintenance apron, a kitchen for the preparation of inflight meals, two employees' parking structures, a new aircraft hangar, an administration facility and a utilities center, and certain improvements to existing buildings, on Miami International Airport property leased by the Authority to National Airlines, Inc. (National) by a Lease Agreement dated as of October 1, 1952, as amended. (R. Vol. I, 139)

The bonds were authorized and were issued after the decision of the Florida Supreme Court holding that they were lawful and valid in all respects. Pursuant to the provisions of a Supplemental Agreement between the Authority and National, dated as of July 1, 1967 (R. Vol. I, 99-138), the foregoing facilities have been leased to National at the rental provided for in the Supplemental Agreement, which contains, among

others, the following provision at issue in this case (R. Vol. I, 131-132):

> "No rentals, fees, licenses, excise or operating taxes, tolls or other charges except those expressly provided in this Supplemental Agreement, and charges for utilities mentioned in the Lease Agreement, shall be charged by the Authority or collected from, directly or indirectly, National for any of the facilities, rights, licenses and privileges granted by this Supplemental Agreement. It is expressly understood and agreed that the Authority shall, if not prohibited by law, assume and pay any and all taxes or improvement charges of any nature whatsoever which may be levied or assessed against the New Facilities, or the leasehold interest of National therein."

Pursuant to the provisions of Chapter 75, Florida Statutes, the County of Dade, Florida, by its Board of County Commissioners acting as Dade County Port Authority, on October 18, 1967 filed its Petition for the validation of the bonds. The Petition incorporated the Lease Agreement of October 1, 1952, as amended, the Supplemental Agreement and the bond resolution (R. Vol. I, 1-11). The Petition named as Respondents the "State of Florida and the Several Property Owners, Taxpayers and Citizens of Dade County, Florida, including Non-residents Owning Property or Subject to Taxation Therein, and Others Having or Claiming Any Right, Title or Interest in Property to be Affected by the Issuance of the Bonds Herein Described, or to be

Affected in Any Way Thereby." On November 14, 1967, there was filed in the proceeding the "Answer of Respondent Dan Paul" (R. Vol. I, 155-158). On the same date the matter came on for hearing, and on November 27, 1967, the Circuit Court entered its Decree validating and confirming the bonds, the Lease Agreement of October 1, 1952, as amended, the Supplemental Agreement and the bond resolution (R. Vol. I, 159-168; Appendix to Petition, A32-A42).

On appeal by Respondents, the State Attorney and Dan Paul, the Supreme Court of Florida affirmed the Decree of the Circuit Court, three of the seven Justices dissenting, one (Justice Drew) with opinion (Appendix to Petition, A1-A26). Under Florida Statutes the State Attorney is required to oppose the Petitioner in all bond validation proceedings.

FLORIDA SUPREME COURT DECISION

In its decision in this case the Florida Supreme Court held:

1. The facilities to be constructed by the County and leased to National served a public purpose primarily. (Appendix to Petition, A2).

2. The decree validating the bonds and the Supplemental Agreement did not violate Section 10, Article IX, of the Florida Constitution, which Section provides that the credit of the State or of any county, city, borough, township or incorporated district shall not be loaned to any corporation, association, institution or individual (Appendix to Petition, A2-A3).

3. The Supplemental Agreement does not violate Sections 1 and 5 of Article IX and Section 16 of Article XVI of the Florida Constitution (Appendix to Petition, A4). (Note: the reference to Article XV in the printed Opinion, 210 So. 2d 200, 202, and in Appendix to Petition, A4, is erroneous.) For the information of the Court, the Sections referred to provide in pertinent part as follows:

"Article IX.

"Section 1. The Legislature shall provide for a uniform and equal rate of taxation, . . ."

"Section 5. The Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for State taxation . . ."

"Article XVI.

"Section 16. The property of all corporations, except the property of a corporation which shall construct a ship or barge canal across the peninsula of Florida, if the Legislature should so enact, whether heretofore or hereafter incorporated, shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, education, literary or charitable purposes."

4. The inclusion in the undertaking of parking facilities, a restaurant and training school was for a public purpose (Appendix to Petition, A6).

5. The financing as shown by the record is consistent with the law of Florida and in no way is it inconsistent with the Constitutions of the State of Florida or the United States (Appendix to Petition, A6).

ARGUMENT OF RESPONDENT

1. *This court does not have jurisdiction to review the judgment of the Florida Supreme Court in this case, as a decision on the application of the equal protection and due process clauses of the Fourteenth Amendment was not necessary to the judgment which rested on independent and adequate state grounds.*

As Justice Jackson stated in *Herb v. Pitcairn*, 324 U.S. 117, 125, 65 S. Ct. 459, 463, "This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." See also *Murdock v. Memphis*, 20 Wall (87 U.S.) 590.

The judgment of the state court which it is sought in this proceeding to have reviewed by this Court was entered in a validation suit brought under the provisions of Chapter 75, Florida Statutes, by the County of Dade, Florida, by its Board of County Commissioners acting as Dade County Port Authority, for the purpose of determining the validity of the bonds and the proceedings therefor, including the Supplemental Agreement. The question of exemption from taxation of the airport facilities financed thereby or of the leasehold interest of National was not a matter which could

be properly raised and adjudicated in the validation proceedings. In *State v. City of Miami*, 103 So. 2d 185, the appeal was from a decision of the Circuit Court upholding the validity of Water Revenue Bonds of the City and holding that the property of the waterworks system of the City, including the portion outside the City limits, was exempt from all taxation. The Court held that the question of tax exemption was a collateral matter not subject to adjudication in a validation proceeding, the sole purpose of validation proceedings being to put in repose any question of law or fact that may be subsequently raised affecting the validity of the bonds. The Florida Supreme Court reversed the portion of the Circuit Court decree finding that all of the property of the waterworks system of Miami was exempt from all taxation and directed that such portion be deleted from the decree.

Among the numerous Florida decisions mentioned by the Court in its opinion in *State v. City of Miami*, supra, was *State v. City of Miami*, 116 Fla. 517, 157 So. 13, 16, a validation proceeding in which it was sought to have disposed of a question as to the validity of the bond resolution provision that no taxes should be imposed by the City upon the bonds. The Florida Supreme Court in its opinion said:

> "But we are not here concerned with this question, as it is one which can only be raised in a direct proceeding relating to the taxation of the bonds . . . So whether this provision exempting the bonds from taxation is valid or invalid, it cannot be questioned in this pro-

ceeding, and the determination of that question would not affect the validity of the bonds."

In the instant case the opinion of the Court made no mention of tax exemption in upholding the validity of the bonds and the Supplemental Agreement, which was all it had authority to do in the validation proceeding under the validation statute. The matter of tax exemption was a collateral matter which should be raised by any party considering himself aggrieved in a direct proceeding relating to such tax exemption. Such forum is and has been open to Respondent Paul. Whether the property or the leasehold interest of National therein is tax exempt or not does not affect the validity of the bonds or the means provided for their payment.

In upholding the validity of the Supplemental Agreement the Florida Supreme Court upheld the document as a whole, which includes the following provisions:

A provision that the obligation of National to pay rent to the Authority sufficient to pay interest and principal and sinking fund requirements of the bonds is absolute and unconditional (R. Vol. I, 112, Art. VI).

A provision that National shall not cancel or terminate the Supplemental Agreement for any reason whatsoever as long as any of the bonds here involved remain outstanding (R. Vol. I, 126, Art. XVIII).

The provision that is the basis of Petitioner's application for a writ of certiorari on the grounds that

it denies equal protection of the laws, which reads as follows:

> "It is expressly understood and agreed that the Authority shall, if not prohibited by law, assume and pay all taxes and improvement charges of any nature whatsoever which may be levied and assessed against the New Facilities, or the leasehold interest therein." (R. Vol. I, 132, Art. XXI)

The provision that the provisions of the Supplement Agreement are severable, and that if any of its provisions should be held to be unlawful by any court of competent jurisdiction the decision of the court would not affect or impair any of the remaining provisions (R. Vol. I, 133, Art. XXV).

It will be noted that in the quoted provision of Article XXI the Authority agrees to assume and pay taxes and improvement charges levied against the undertaking or the leasehold interest of National therein only "if not prohibited by law". In other words, if such assumption and payment should be unlawful for any reason, including a denial of equal protection of the laws, the Authority would be under no obligation to make any such assumption or payment and no one's right, constitutional or otherwise, would be violated.

Furthermore, if the Authority should at any time threaten or undertake to assume and pay taxes levied against the undertaking or the leasehold interest of National and, in a proper proceeding, the Article XXI provision should be declared invalid for any reason,

that provision would be exscinded pursuant to Article XXV and the absolute obligation of National under Articles VI and XVIII to pay rent for debt service and sinking fund requirements would not be affected or impaired.

It is clear from the foregoing that in validating the bonds and the Supplemental Agreement no decision on the appplication of the equal protection and due process clauses of the Fourteenth Amendment was necessary, and that the judgment of the Florida Supreme Court rested on independent and adequate state grounds.

2. The property here involved, owned by the County of Dade and leased to National, is immune from taxation and therefore the equal protection and due process clauses of the Fourteenth Amendment have no application.

The Florida Supreme Court, in *Park-N-Shop, Inc. v. Sparkman*, 99 So. 2d 571, held that county-owned property is immune from taxation. This case involved a block in the City of Tampa owned by Hillsborough County which had been leased to certain individuals for a period of 5½ years for use with an option to purchase on specific terms. Among the provisions of the lease was one that "no ad valorem taxes whatsoever (County or City)" should be levied against the property (with a provision that if a building should be erected on the property the building should be taxed). The appellants in the case charged that the block was being used by the private individual lessees for commercial uses that competed with other businesses, and competed unfairly

because the operators using the property were relieved of taxes while those who competed with them had to carry their share of the tax burden.

In its opinion the Court said, in part:

> "If seems from the decisions of this court and those of other jurisdictions that the criterion in determining the taxable character of property is the nature of the use to which it is put and not the ownership. (Citing cases) But these decisions are of no assistance because the primary problem is whether or not a tax may be levied on property of the county . . .
>
> "After a careful study of appropriate provisions of the Constitution and the statutes we decide that property of the state and of a county, which is a political division of the state, Sec. I, Article VIII, is *immune* from taxation, and we say this despite the references to such property in Sec. 192.06 (1) and (2), supra, as being exempt. As we have shown in quoting the provisions in the Constitution dealing with county taxes, the inhibitions were aimed at the expenditure for other than county purposes of taxes raised by counties."

Then, referring to the provision in the lease that no county or city ad valorem taxes should be levied against the property, the Court said:

"Feeling that the property of the county was immune from taxation we decline to hold that it should assess taxes against its own land, pay the money to itself, then surcharge the lessees for the amount on the theory that the so-called tax exemption provision of the lease was illegal . . . ."

"We are puzzled by the attempt of the county to relieve the lessees of the payment of city taxes, but certainly the city could not, as the county could not, assess county property for taxation . . ."

In the recent case of *Hillsborough County Aviation Authority v. Walden*, 210 So. 2d 193 (rehearing denied June 5, 1968), the Florida Supreme Court had occasion to consider directly the bearing of its decision in *Park-N-Shop, Inc. v. Sparkman*, supra, on the taxability of a leasehold interest in property owned by a county, and held that the immunity from taxation of Hillsborough County did not extend to the leasehold interest of a motel corporation using the property for a predominantly private purpose. However, it held in this case that the use by a lessee of property owned by the Hillsborough County Aviation Authority for restaurant purposes was predominantly public in nature, any use for private purposes being only incidental to the predominant public use, and that therefore the tax exemption afforded the property of the Authority extended to the leasehold interest.

Since the use by National of the airport property here involved is, and has been held by the Florida Su-

preme Court to be, the performance of a public function for the use and benefit of the public, the immunity of the County from taxation extends to the leasehold interest of National, and the equal protection and due process clauses of the Fourteenth Amendment have no application.

3. In any event and without regard to any of the principles and conclusions stated above, exemption from taxation of the airport property leased to National and the leasehold interest therein is lawful and does not contravene the equal protection and due process clauses of the Fourteenth Amendment.

The limitations imposed by the Fourteenth Amendment on exemption from taxation of the types here involved may be summarized as follows: The due process clause of the Fourteenth Amendment requires that governmental resources be devoted to public purposes. When private ends are advanced by the use of governmental resources, the private benefit must be incidental only to the overall public objective and purpose. In so far as the equal protection clause of the Fourteenth Amendment is concerned, any tax exemption favoring one particular segment or group must not be arbitrary or unfairly discriminatory. The tax exemption here involved is within each of these limitations.

The financial arrangement between the Authority and National was held by the Florida Supreme Court to be for a public purpose, to which holding the Petitioner has not taken exception.

Any private benefit to National is incidental to the overall public objective or purpose. In this connection the Florida Supreme Court said:

> "Objection is made because National is to have the exclusive use and control of this facility and that they will not doubt earn profits on the same. It is quite obvious that National must make a profit to stay in business. It is a well-known fact that they are not running a great airline as an eleemosynary institution. On the other side the Authority has an obligation to avail itself of competent and dependable agencies such as National, as chosen in this case, to perform this public function for the use and benefit of the public. It would seem to follow that National must of necessity have control of the premises upon which they are paying the lease."

(Appendix to Petition, A6)

Classifications for tax purposes based upon transportation facilities are valid. *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 369, 60 S. Ct. 968 972: ". . ., so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another, . . ."

The tax exemption of the airport property here involved is reasonable and is constitutionally permissible. This Court said in *Allied Stores v. Bowers*, 358

U.S. 522, 528, 79 S. Ct. 437, 441: ". . ., it has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the equal protection clause of the Fourteenth Amendment." Here the Florida Supreme Court found that a purpose of the financing was the continued development of the Miami International Airport (Appendix to Petition, A2).

CONCLUSION

It is submitted that the Petition for a Writ of Certioari should be denied for the following reasons:

(1) This is not a case subject to review by this Court, since it is a validation proceeding in which there is and can be no determination as to the legality of any tax exemption granted. The judgment of the Florida Supreme Court was based on independent and adequate state grounds, and a decision on the Federal question raised by Petitioner was not and is not necessary to sustain the State Court's judgment.

(2) The property involved, being property of a county which is a political division of the State, is immune from taxation, both as to the county and its lessee, and hence is not subject to constitutional requirements for exemption.

(3) Any tax exemption here involved does not in

any event contravene the equal protection and due process clauses of the Fourteenth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari was served by mail upon MESSRS. PAUL and THOMSON, Attorneys for the Petitioner, 1314 First National Bank Building, Miami, Florida this 21st day of October, 1968.

William D. Gillis

General Counsel for Respondent